Supreme Court, U.S.
FILED

09-449 JUL 30 2009

OFFICE OF THE CLERK

No: 08-727

In The
Supreme Court of the United States

LESTER PATRICK

Petitioner,

V.

SECRETARY PEAKE, DEPARTMENT OF VETERANS AFFAIRS

Respondent.

On Petition For Writ Of Certiorari To The Ninth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

Lester Patrick
9522 Bismark Place
Stockton, Ca. 95209
209-957-2937

QUESTIONS PRESENTED

The ninth circuit court of appeal in its decision in this case has established a precedence that results in lawyers having one set of rules to follow while non-lawyers operating in pro se have another set of rules to follow as it relates to the filing of a "notice to file an appeal".

In order to ensure that this injustice is eliminated from the court system, it is imperative that the United States Supreme Court review this case and answer the following questions.

1. Is it constitutional for an appeals court to apply one standard for lawyers and another standard for non-lawyers, or individuals operating in pro-se as it relates to the court's decision on filing deadlines for filing a "Notification for Appeal"?

2. Should a petitioner operating in pro se be punished for filing a late "Notice of Appeal" if the appeal was filed on time but was lost by the district court?

3. When illness of a petitioner operating in pro se interferes with the petitioner's ability to file a "notification to file an appeal", does that constitute "excusable neglect"?

PARTIES TO THE PRECEEDING

Petitioner is Lester Patrick. He is plaintiff in the District Court and the appeallee in the Court of Appeals. Plaintiff brings this action on his own behalf.

The following were defendants / respondents in district court:
Jonathan U. Lee, U.S. Department of Justice Secretary, Department of Veteran Affairs

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinions of the Ninth Circuit Court of Appeals at Ex. 1, Ex. 2, Ex. 5.

JURISDICTION

The judgment of the Court of Appeals was entered on June 15, 2008. (Ex. 1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

I. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) Rule 4(a)(5)(A) extend the time to file a notice of appeal if (i) a party so moves within the original appeal period or no later than thirty days thereafter; and (2) regardless of whether its motion is filed before or during the time prescribed in Rule 4(a) expires, the party "shows excusable neglect or good cause."

(2) rule 4(a)(1)(B) states "when the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from was entered.

(3). Title VII of the Civil Rights Act of 1964, Civil Rights Act of 1964 SEC. 2000e-2. *[Section 703]* **(a)** It shall be an unlawful employment practice for an employer; (1). to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(4) Civil Rights Act of 1866, United States Code,Title 42, § 1982; Which states, "All citizens of the United States shall have the same right, in every State and Territory, as enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." and § 1981(a), and (b), which says: all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, ... and to the full and equal benefit of all laws and proceedings for the security of person and property....

(b) "Make and enforce contracts" defined "For the purposes of this section, the term make and enforce contracts' includes the making performance, modification, and termination of contract the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship."

II. STATEMENT OF THE CASE

This case presents three questions, one question asks whether it is constitutional for the Ninth Circuit Court of Appeals to have one standard for lawyers and another standard for non-lawyers, or individuals operating in pro-se as it relates to the court's decision on filing deadlines for filing a "Notification for Appeal".

A second question asks if a petitioner operating in pro se should be punished for filing a late "Notice of Appeal" if the appeal was filed on time but was lost by the district court.

A third question asks whether illness of a petitioner operating in pro se is a legitimate reason that a court can use when deciding if the filing of a "Notification for Appeal" is timely.

This specific case was filed against the Department of Veteran Affairs but has implications for all citizens operating in pro se who have a need to file a "Notification of Appeal".

A recent estimate by a federal court is that over fifty percent of all cases filed are filed by individuals who defend themselves or who operate in pro se status. This

number can be expected to increase as the cost of legal representation continues to rise and fewer and fewer citizens can afford a lawyer to represent them in court.

III. FACTUAL BACKGROUND

A. Plaintiff

Plaintiff filed a complaint in March 2000 claiming he was not being provided the necessary space to support his work activities. In October 2000, Mr. Patrick filed a second EEO complaint because he was non-selected for GS-14 Lead Computer Specialist (vacancy OI-00-107) due to race discrimination. (This second EEO claim resulted in Action 03-CV-02571

In December 2001, the incumbent for the Supervisory Information Specialist position vacated the job. In January 2002, David Bradley became the acting Supervisory Information Specialist and he remained in that position until he received the appointment to fill the job.

The Supervisory Information Specialist's duties included serving as team manager for Operations Systems/Network Services, Enterprise Management Center.

I submitted my application for the position. Two days later, the VA issued a certificate four eligible candidates for the position, including Mr. Patrick. On December 5, 2002, a panel of three conducted interviews of the four eligible candidates.

The panel consisted of Michael Lay from Ann Arbor, Michigan, Anke Linton from Martinsburg, West Virginia.

The panel referred Mr. Bradley to the selecting official Gerry Barry as the recommended selection. On December 11, 2002, the VA sent plaintiff a letter informing him that MR. Bradley had been selected for the position.

Plaintiff sought EEO counseling for position 122 for the first time on January 15, 2003, and filed a written claim of employment discrimination on February 23, 2003. There was a hearing before Administrative Law Judge David Kelly in San Francisco on June 16-17, 2004.

The issue presented was whether plaintiff was discriminated against based on race and in reprisal for prior EEO activity when Gerry Barry informed the review panel of my prior EEO activity and whether or not I was the victim of race discrimination.

The administrative law judge found that Mr. Barry had retaliated against plaintiff when he informed one or more of the panelists about his prior EEO activity. The administrative law judge also found that there was no disparate treatment and no race discrimination in the decision.

Plaintiff filed a formal complaint in district court on Aug 11, 2005

On or around May 12, 2008 petitioner became ill.

The district court on May 16, 2008 issued an Order approving summary judgment for the Agency.

On or around May 30, 2008 petitioner learned that he had to undergo major surgery shortly after then.

On July 14, 2008 petitioner filed a "request for permission to file a motion for reconsideration".

On July 15, 2008 petitioner filed a "motion to extend the time to file a motion for a hearing", until a response from the "request for permission to file a motion for reconsideration" was final if the motion did not go in favor of the petitioner.

On July 23, 2008 the district court issued an order denying both orders. **(Exhibit 4, page 4-6)**

On July 29, 2008 petitioner underwent major surgery.

On Aug. 20, petitioner filed his first "notice of appeal" with the district court from the order issued on July 23, 2008.

The court did not file the "notice of appeal" that it received Aug 21.

Defendant did not oppose the first "notice of appeal" because it was timely.

On November 17, after learning from the court that it had not filed my "notice of appeal", petitioner at the request of the court filed a second "notice of appeal"

On Dec. 18, 2008 petitioner received a "motion to dismiss" from the defendant due to late filing of "the notice of appeal".

On Dec. 30, 2008 petitioner filed a response to the defendant's "motion to dismiss".

On Jan 21, 2009 the 9th Circuit Court of Appeals dismissed petitioner's case due to lack of jurisdiction.

B. Material point of fact or law overlooked in the decision.

I first filed my "notice of hearing" on Aug. 20, 2008 but it was lost by the District Court. Just as rule 4(a)(1)(B) states "when the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from was entered.

The judgment that the petitioner appealed from was the judgment entered by the district court on July 23, 2008. Therefore a "notice of appeal" had to have been made by September 23, 2008. Petitioner filed his first "notice of appeal" on August 20, 2008 almost thirty days prior to the expiration of the time allowed under rule 4(a)(1)(B).Unfortunately, the district court lost the "notice of appeal" and I had to file a second one.

It was not until Nov. 17, 2008 that I learned that the court did not file his "notice for appeal". When I learned that my appeal had been lost by the court I sent another copy at their request.

The defendant did not oppose the first filing of the "notice of appeal" because he knew it was timely. The defendant didn't oppose the first timely filing in district court nor appeals court.

I filed the first "notice of appeal" on Aug. 20, 2008, so if the defendant was going to oppose it for being untimely then he needed to have filed it by Sept. 20, 2008.

Allowing the defendant to take advantage of a mistake by the district court clerk whose responsibility it was to file petitioner's first "notice of appeal" by opposing the notice of appeal only after the clerk filed it late is a great injustice. The defendant filed his "motion to dismiss" on Dec. 15, 2008. This was almost 90 days after petitioner filed his first "notice of appeal" The defendant's notion to dismiss was untimely.

IV. PROCEEDINGS BELOW

A. The District Court

Plaintiff initially filed an EEO complaint with the district court on Aug 11, 2005.

The district court issued a summary judgment ruling on May 16, 2008.

V. REASONS FOR GRANTING THE WRIT

Petitioner Can Show Excusable Neglect

A. Petitioner can show "good cause" and "excusable neglect" for "Notice of appeal" being submitted at the time that it was submitted.

During the period beginning around the middle of May 2008, petitioner started to experience routine swelling of the left side of his lower face and neck during and after meals. After taking an MRI of the area, the doctors determined that I had a stone in my left parotid gland located in my neck. They did not know at that time if it was a tumor and or if it was malignant. The doctors recommend that petitioner undergo a parotidectomy to remove the stone. The diagnosis was that I had a sialolithiasis on the left parotid gland that had to be removed through surgery. The surgery was scheduled for July 29, 2008. **(Exhibit 3 page 8-10)**

During this period I had difficulty concentrating on anything other than the pending major surgery. Consequently, the majority of the months of June and July 2008, I was awaiting a surgery date and preparing myself mentally to undergo the surgery. Knowing that I would be out of circulation for at least a couple of months, I also had numerous personal tasks that had to be taken care of during this period. This was a very mentally straining period to say the least. For me this was a major distraction and completely out of my control.

This medical condition had at the time a tremendous impact on my ability to focus on this case. I received the

summary judgment ruling on or around **May 18, 2008**. I filed a response to the summary judgment ruling on **July 14, 2008.** By this time I knew that my surgery would be in July but I thought initially it would be at the end of the second week of July.

Before filing a motion for a hearing I contacted both the district court and the pro se telephone line at the 9th Circuit Court of Appeals to ask about filing the "motion for appeal", because I had also filed the request for permission to file for reconsideration.

The district court told me that the judge usually didn't grant "requests for reconsiderations" and that if I filed a "motion for appeal" with the 9th Circuit she would have to cancel the request for "permission to file for a reconsideration".

The person I spoke to at the Ninth Circuit Court of Appeals on the pro se help line told me that I had to file an appeal from the last judgment from the district court and that if I had a motion pending I had to wait until that motion was ruled on and then file an appeal from that motion since it was the last judgment from the district court. I checked the packet that the 9th Circuit Court of Appeals sends to people proceeding in pro se describing the appeals process and it says "order from which appeal is taken". This seemed to collaborate what the person on the pro se help line was saying.

But at this point I was still confused so I filed another motion on **July 15, 2008** requesting to extend the time to file with the 9th Circuit based on the outcome of the "request for permission to file for reconsideration".

As stated above, my total focus was on preparing myself for the upcoming surgery I needed to take and also dealing with the discomfort of having the left side of my neck and face swollen. Additionally, it became necessary prior to the surgery for me to take antibiotics and a pain reliever that caused drowsiness and further lack of concentration.

The point is that due to my unexpected medical situation during that period, I was not mentally alert during the period and the closer it got to the pending surgery the less focus I had on anything other than the surgery.

My surgery took place on **July 29, 2008**. I was on sick leave from the time of the surgery until October. During the majority of this time I was taking very strong pain medication for sever pain from the surgery. It was extremely difficult to concentrate.

I was able towards the end of August to file a **"motion for appeal"** from the last judgment by the district court.

In December I was still recovering but still not fully prepared to deal with this case. I had been taking very strong pain medication for three months and my mental capacity was still not normal. But I filed a motion to the Ninth Circuit Court of Appeals in response to a "motion to dismiss".

The point being made here is that if it can be interpreted that the "notice of appeal" that I filed on **August 20, 2008 and re-filed on November 17** after learning that the district court had lost my first **"notice for hearing"** was late, then there is **"good cause"** for my actions.

As explained above, during this time period my actions were overwhelmingly controlled by the medical condition I was dealing with. This situation was totally out of my control.

My understanding from my interpretation of the pro se instructions provide to me via mail, feedback from the district court, and feedback from the pro se help line was that I was to appeal from the last order from the district court. My judgment was clouded by the medical condition I was experiencing at the time.

I did during this period file a "request to file a motion for reconsideration" of the summary judgment motion on **July 14, 2008** but my mental concentration was very lacking.

B. THE NINTH CIRCUIT'S COURT HAS RULED ON A FEDERAL QUESTION THAT IS IN CONFLICT WITH EARLIER RELEVANT RULINGS OF ITS OWN

1. An apparent conflict with another decision of the Court

There is a conflict between the ninth circuit court's position in United States v. Sadler, 480 F.3d 932, 937 (9th Cir. 2007)

(requirement of timely notice of appeal is jurisdictional) and its decision in Pincay.

In Sadler, the Ninth Circuit Court of Appeals ruled that the government did not give up its rights to oppose an untimely filing of a "notice of appeal" since it had not oppcsed the filing in district court.

But in Pincay the Ninth Circuit Court of Appeals ruled that the district court is in the best position to determine whether or not an appellant should be granted the opportunity to file a late filing of a "notice of appeal".

Below is an excerpt from the Ninth Circuit's ruling in Sadler;

> "The instant case, however, involves the timing of the filing of a notice of appeal, rather than a motion within the purview of the district court. Once a notice of appeal is filed, the district court loses jurisdiction over a case. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982) (per curiam) ("The filing of a notice of appeal is an event of jurisdictional significance — it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.").

The government therefore acted correctly by asserting its objection in our court rather than the district court."**United States v. Sadler, 9th Circuit Court of Appeals**

But in my case the defendant did not oppose the first filing of the "notice of appeal" because he knew it was timely. The defendant didn't oppose the first timely filing in district court nor appeals court. I filed the first "notice of appeal" on Aug. 20, 2008, so if the defendant was going to oppose it for being untimely then he needed to have filed it by Sept. 20, 2008.

Allowing the defendant to take advantage of a mistake by the district court clerk whose responsibility it was to file petitioner's first "notice of appeal" by opposing the notice of appeal only after the clerk filed it late is a great injustice. The defendant filed his"motion to dismiss" on Dec. 15, 2007. This was almost 90 days after petitioner filed his first "notice of appeal"

Pincay

The Ninth Circuit Court of Appeals made the following comments in Pincay II

> "We recognize that a lawyer's failure to read an applicable rule is one of the least compelling excuses that can be offered; yet the nature of the contextual analysis and the balancing of the factor adopted in *Pioneer* counsel against the creation of any rigid rule. Rather, the decision whether to grant or deny an extension of time to file a notice of appeal should be entrusted to the discretion of the district court because the district court is in a better position than we are to evaluate factors

> such as whether the lawyer had otherwise been diligent, the propensity of the other side to capitalize on petty mistakes, the quality of the representation of the lawyers (in this litigation over its 15-year history), and the likelihood of injustice if the appeal was not allowed."

The decision made in Pincay II to give the district court the authority to decide on when a litigant should be allowed to an extension to file a notice of appeal disputes the decision in Sadler when the Ninth Circuit rules that once the "notice of appeal" is filed the district court no longer has any jurisdiction.

If that is the case then it also means that when I filed a request for an extension to file a "notice of appeal" in district court the judge had no authority to rule on it.

> A district court may under Rule 4(a)(5)(A) "extend the time to file a notice of appeal if (1) a party so moves within the original appeal period or no later than thirty days thereafter; and (2) regardless of whether its motion is filed before or during the time prescribed in Rule 4(a) expires, the party "shows excusable neglect or good cause."

In this case I have shown both" excusable neglect" and "good cause".

In 2004, the United States Court of Appeals for the Ninth Circuit, sitting en banc, decided *Pincay v. Andrews*. In *Pincay II*, the court affirmed a district court's finding of excusable neglect—and thus its decision to extend a party's time to appeal—when a lawyer left to a paralegal serving as his law firm's calendaring clerk responsibility for calendaring appellate deadlines and the paralegal calendared the wrong date.

In Pincay the Ninth Circuit upheld a district court's decision to allow a lawyer an extension to file a "notice of appeal" This was a lawyer with many years of law experience.

The petitioner in this case has no law experience at all. Lets just say for the sake of argument that petitioner did miss the filing date. Obviously it wasn't done intentionally. If a lawyer who has many years of experience in law can be given the opportunity for an extension to file a "notice of hearing" then shouldn't a person with no experience at all in law and no training at all in the field of law who is proceeding in pro se be given the same opportunity? That is the real question here, whether there is one standard for individuals who operate in pro se and another standard in the same court for lawyers.

C. THE NINTH CIRCUIT'S COURT HAS RULED ON A FEDERAL QUESTION THAT IS IN CONFLICT WITH THE SUPREME COURT AND IN CONFLICT WITH ITS OWN PREVIOUS RULINGS.

Pincay v. Anderson United States Court of Appeals for the Ninth Circuit

In Pincay the district court applied Pioneer and concluded that Andrews's time in which to appeal should be extended because **"attorney mistakes made in good faith with no prejudice to the other party are excusable neglect." Pincay 1, 351 F.3d at 954**. In this same case, Judge Kleinfeld dissented, asserting that following Pioneer

"ignorance of the law and negligent delegation can indeed be classified as excusable neglect"

If lawyers who have years of experience processing cases in federal court can make this mistake, a person such as me who has no law background can easily make this mistake. The Ninth Circuit Court of Appeals in this case has concluded that, "Any rationale suggesting that misinterpretation of an unambiguous rule can never be excusable neglect is, in our view, contrary to that instruction. **Pincay v. United States**

Therefore by the Ninth Circuit Court of Appeals' standards, any delay in filing a "notice of appeal" that came about as a result of my interpretation of the rule, that I was suppose to file a "notice of appeal" in response to the conclusion of the last judgment from the district court can be viewed as excusable neglect.

In this case, there was no prejudice to the other party. I also acted in good faith. There was no intent to fail to meet the deadline to file a "motion for appeal". If I didn't miss the filing deadline intentionally, then missing the deadline can only be seen as a mistake or as a result of external conditions outside my control.

D. THE SUPEREME COURT'S RULING IN PIONEER IS DIFFERENT THAN THE DECISSION THE NINETH CIRCUIT COURT OF APPEALS HAS MADE

Pioneer Investment Services Co. v. Brunswick Associates Ltd.

In this case the United States Supreme Court was asked to decide whether an attorney's inadvertent failure to timely file a bankruptcy proof of claim could constitute excusable neglect within the meaning of Bankruptcy Rule 9006(b)(1). The Supreme Court concluded that the determination of whether a party's neglect is excusable "is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." **Pioneer, 507 U.S. at 395.**

The Supreme Court went on to say that, federal courts may "accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." **Pioneer, 507 U.S. at 388**

This is very relevant to my case because if it can be interpreted that my "motion for appeal" was filed late then it is due to both a mistake and intervening circumstances beyond my control.

Specifically the late filing is due to a mistake that I would have made as a result of a conclusion based upon feedback from the district court, the pro se help line, and my interpretation of Rule 4a that I was required to submit a "motion for appeal" after the last judgment from the district court. Accordingly, the Supreme Court has ruled that the district court could have accepted my filing for causes of inadvertence, mistake, or carelessness.

Additionally, during this period I was plagued by a medical condition that significantly hindered my ability to focus on the case. This situation represents intervening circumstances beyond my control just as the Supreme Court has ruled in Pioneer qualifies for acceptance of late filing.

The Supreme Court also said in the Pioneer case that,

> "In determining whether to allow late filings, circumstances that courts should consider include "the danger of prejudice to the [non-moving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of he movant, and whether the movant acted in good faith." **Pioneer, 507 U.S. at 395.**

There is no doubt that allowing me to file a "motion for appeal" will not prejudice the case of the non-moving party. The length of delay was not an issue because the judge didn't refer to it as being an issue in her ruling. There is no negative impact on the judicial proceedings. And lastly, I provided documentation to show my medical condition during the referenced period. I did act in good faith. There was no advantage in me intentionally missing the filing deadline for a case that I have been working on for 5 years now.

Accordingly, this is the type of case that the Supreme Court was referring to when it said federal courts may "accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." **Pioneer, 507 U.S. at 388.**

VI. THIS CASE PRESENTS ISSUES OF FUNDAMENTAL NATIONAL IMPORTANCE

The questions that have been presented here pose three issues that are of fundamental national importance.

First of all it is important that the supreme court accept this case to clarify the conflicting rulings that the ninth circuit has made between Sadler and its decision in Pincay. The decisions by the ninth circuit are in complete contradiction to each other and not in agreement with the ruling of the United States Supreme Court in Pioneer.

In Pincay vs. Anderson, the ninth circuit gave a lawyer with many years of experience, an extension to file a "notice of appeal" because he missed the filing deadline. Yet, I am not being granted the same opportunity. This establishes a precedence of having one set of rules for lawyers and another set for individuals filing in pro se. This is extremely important because over fifty percent of cases involve individuals who operate in pro se.

Only the United States Supreme Court can correct this injustice. By accepting this case and making a decision the supreme court will decide if it is constitutional for lawyers to operate by one set of laws as it relates to filing a "notice to appeal", and another set of laws for non lawyers who operate in pro se.

CONCLUSION

For the foregoing reasons, Lester Patrick respectfully requests the Court to grant his petition for certiorari.

Respectfully submitted,

Lester Patrick
9522 Bismark Place
Stockton, Ca. 95209
(209) 957-2937

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EXHIBIT 1

FILED
JUN 15 2008

MOLYLY C DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATS COURT OF APPEALS

FOR THE NINTH CIRCUIT

LESTER E. PATRICK — NO.08-17552

PLAINTIFF – Appellant,

v.

D.C. No. 3:05-cv -03280- MHP

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO

SECRETARY R. JAMES NICHOLSON, DEPARTMENT OF VATERANS AFFAIRS,

Defendant – Appellee.

MANDATE

The judgment of this Court, entered 1/2/09, takes affect this date.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
Clerk of Court

By: Gabriela Van Allen
Deputy Clerk

EXH 2

FILED
JUN 08 2009

MOLYLY C DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATS COURT OF APPEALS
FOR THE NINTH CIRCUIT

LESTER E. PATRICK NO.05-17552

PLAINTIFF – D.C. No: 3:05.cv-

Appellant, 03280-MHP

NORTHERN
v. DISTRICT OF
CALIFORNIA,
SAN FRANCISCO

SECRETARY R. JAMES NICHOLSON,
DEPARTMENT OF VATERANS **ORDER**
AFFAIRS

Defendant – Appellee.

Before: O'SCANNLAIN, SILVERMAN AND BYBEE,

Circuit Judges.

Appellant's petition for panel rehearing is construed as a motion for reconsideration of this court's January 21, 2009 order dismissing this appeal for lack of jurisdiction. The district court did not abuse its discretion in denying appellant's option for an extension of time to appeal pursuant to Federal Rule of Appellate Procedure 4(a)(5) because appellant failed to show good cause or excusable neglect. Even if appellant's notice of appeal was received by the district on August 21, 208, it would only be timely as to the July, 23, 2008 order denying the motion for leave to file a motion for reconsideration and the district did not abuse its discretion in denying that motion. Accordingly, appellant's motion for reconsideration is denied. See 9th Cir R. 27-10.

EXHIBIT 4

FILED
JUL 23 2008

RICHARD W, WIEKING, CLERK
U.S. DISTRICT COURT
NORTHER DISTRICT OF CALIFORNIA

UNITED DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LESTER E. PATRICK

NO.C 05-03280 MHP

Plaintiff,

ORDER

Re: Leave to File Motion for Reconsideration; Extension of Time to File Ninth Circuit Appeal

v.

R. JAMES NICHOLSON, Secretary, Department of Veteran Affairs

Defendant.,

On July 14, 2008 plaintiff Lester Patrick requested leave to file a motion for reconsideration of the court's order dated May 16, 2008, which granted defendant's motion for summary judgment. See document No. 75. Plaintiff claims that the Supreme Court's recent decision in CBOCS West, Inc. v. Humphrey, issued May 27, 2008, has changed the legal landscape such that a reconsideration of this action is warranted. Plaintiff also contends that court clearly failed to consider material facts or key legal arguments in its May 16, 2008 order. Neither argument is persuasive. Consequently, plaintiff's request for leave to file a motion for reconsideration is DENIED.

In the alternative, plaintiff seeks an extension of time limit within which to file an appeal of this court's decision with the Ninth Circuit Court of Appeals. Plaintiff, however, has not demonstrated excusable neglect or good cause as required by Federal Rule of Appellate Procedure 4(a)(5), the rule that sanctions such extensions. Consequently, plaintiff's motion for the extension is denied. If plaintiff chooses, he may present his extension request to the Ninth Circuit directly.

IT IS SO ORDERED

Dated July 22, 2008

s/: MARILYN HALL PATEL

EXHIBIT 5

United States District Court Judge
Northern District of California

FILED
JAN 21 2009

MOLYLY C DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATS COURT OF APPEALS
FOR THE NINTH CIRCUIT

LESTER E. PATRICK

Plaintiff – Appellant,
3:05.cv-

NO.08-17552

D.C. No:

03280-MHP

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO

SECRETARY R. JAMES NICHOLSON, DEPARTMENT OF VATERANS AFFARIS

ORDER

Defendant – Appellee.

Before: O'SCANNLAIN, SILVERMAN AND BYBEE,

Circuit Judges.

Appellee's motion to dismiss this appeal for lack of jurisdiction is grant See 28 U.S.C.&2107(b); United States v. Sadler, 480 F.d 932, 937 9th Cir. 2007) (requirement of timely notice of appeal is jurisdictional).

All other pending motions are denied as moot.

DISMISSED:

EXHIBIT 3

MEDICAL DIAGNOSIS

CHART NOTE **10/01/2008**
Patient: Patrick, Lester **Primary Care**
DOB 9-25-50 **Physician: P. Drummond**

HISTORY: The patient is status post left superficial parotidectomy 29 July 2009 for chronic sialadenitis.

History of Present Illness: His pain has gone away. He no longer is swelling up with meals. He had some spitting sutures come out at the last visit, but since the time he had a couple come out of the fist couple of days after the last visit and then none since. There are a couple os small bumps on the inferior portion of the incision.

ENT PNHYSICAL EXAMINATION:
Constitutional: T: 98.3 BP: 139/99 P: 65

ENMT: The incision line is healing up quite well. Thee are not spiting sutures. Therea are a couple of small bumps which may either sutures beneath the skin or mild hypertrophy of the scar.

MEDIACAL DECISION MAKING
Management Options: T discussed with him about using Scarguard or vitamin E or other oil. The patient will follow up in six month

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CSJ/sw

St. Joseph's Medical Center

SURGICAL PATHOLOGY REPORT

Patient Name: Patrick, Lester E **Accession#** J08
Med. Rec. # 323141 2800
Account #: 1012656300 **Location:** 999
DOB 9/25/1950 (Age 57) M **Date of**

Procedure:

7/29/2008
Date of Receipt:
7/29/2008

Clinical Diagnosis and History:
Left parotid stone.

Specimen and Site
Lest superficial parotid

Gross Description
Received flesh labeled" Patrick, Lester, left superficial parotid with suture at the cut of parotid duct, "is a 15 gram, 5.5 x 4.9 x1.6 cm product of a left parotidectomy. The surface is

pink-purple, intact, and lobular, There is a 1.2 cm in length and up to 0.3 cm in diameter tubular pink-whit soft tissue, with a suture at one end, designated by the surgeon as the cut of parotid duct. No masses are palpable. The margins are inked black. Sectioning the duct reveals that the lumen is occluded with a calcified yellow-white stone. Sectioning the gland reveals a fatty lobular yellow cut surface, with no discrete lesions. Representative sections are submitted in six cassettes, as labeled: A-parotid duct margin, B-C-parotid duct with adjacent parenchyma, D-F uninvolved parotid parenchyma. (AMS)

Microscopic Description

The parotid gland shows a dilated duct, partially lined by squamous metaplasia, a moderate chronic inflammatory infiltrate, and moderate destruction of acinar tissue, The findings are consistent with sialolithiasis. Two intraparotid lymph nodes show nos significant histologic abnormality. No malignancy is identified. (HHY)

FINAL PATHOLOGIC DIAGNOSIS

SUPERFICIAL PAROTID GALND, LEFT, PAROTIDECTOMY: BENIGN PAROTID GLAND WITH SIALOLITHIASIS

7/31/08 s/: Helen H. Yen, M.D